72-1581

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1581

ROBERT ALLEN BYRON, ROBERT FRANCIS PRUCHA AND ULYSSES MCGHEE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
List of Cases	i
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions	2
Statement	2
Reasons for Granting the Writ	8
Conclusion	11
Appendix (Memorandum Order of the Court of Appeals for the Seventh Circuit)	A1

LIST OF CASES.

Aguilar v. Texas, 378 U. S. 108	8
Beck v. Ohio, 392 U. S. 89	8
Draper v. United States, 358 U. S. 307	8
Giordenello v. United States, 357 U. S. 480	8
Henry v. United States, 361 U. S. 98	8
Sibron v. New York, 392 U. S. 40	9
Spinelli v. United States, 393 U. S. 410	8
Terry v. Ohio, 392 U. S. 1	9, 10, 11
United States ex rel. Richardson v. Rundle, 325 F. Supp. 1262 (E. D. Pa., 1971)	10

CONSTITUTIONAL PROVISION.

Fourth Amendment to the Constitution of the United States	2

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The Petitioners, Robert Allen Byron, Robert Francis Prucha and Ulysses McGee, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered April 24, 1973 affirming judgments of conviction previously entered upon them in the United States District Court for the Northern District of Illinois.

OPINIONS BELOW.

There was no opinion in the District Court and its judgment is not reported. The judgment of the Court of Appeals for the Seventh Circuit was announced in a memorandum order which is not reported. That order has been reproduced as an appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals affirming the judgments of conviction and sentences of the District Court was entered on April 24, 1973. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1245(1).

QUESTION PRESENTED.

Can the detention of the three petitioners, Byron, Prucha and McGhee, the subsequent search of their vehicle and on the scene identification procedures, be justified under the Fourth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS.

Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT.

Petitioners Robert A. Byron, Robert F. Prucha and Ulysses McGhee were indicted by the grand jury of the District Court along with Edward J. Durkin in two counts alleging violations of 18 U. S. C. 659, theft from an interstate shipment. Durkin entered a plea of guilty prior to trial and did not appeal. Byron, Prucha and McGhee each filed an identical and comprehensive motion to suppress evidence alleging the unconstitutionality of the arrest of each and moving the Court to apply the exclusionary rule and suppress evidence obtained as a result of those arrests. Specifically, the motion extended to seek the suppression not only of any physical evidence seized from the U-Haul van in which

they were arrested, but the identification testimony both in-court and out-of-court obtained by the prosecution as a result of the arrest. A hearing on the motion to suppress was held prior to trial and the District Judge denied the motion. A jury was then selected and sworn and the cause proceeded to trial, the government offering and the Court admitting, over the objection of defendants, both the challenged identification testimony and seized physical evidence. The trial resulted in a verdict of guilty as to each defendant, R. 24.[1] Defendant Byron was sentenced to incarceration for a period of five years; defendant Prucha to incarceration for a period of six years and the defendant McGhee to incarceration for a period of seven years, each sentence imposed separately upon each of the two counts of the indictment but set to run concurrently with each other. R. 35. From those judgments and sentences appeal was taken to the Court of Appeals for the Seventh Circuit. That Court affirmed.

At the hearing on the motion to suppress it developed that Daniel M. Koebele, a Kane County Deputy Sheriff, while engaged in routine patrol with his partner, David Lorang, received a message that a theft was in progress at the Consolidated Freightways terminal south of Aurora, Illinois at approximately 11:56 P. M. on May 26, 1971. The officers immediately drove to the scene arriving moments after midnight on May 27. On the way, Koebele testified, they passed the Parkside Bowling Alley, a few blocks north of the Consolidated Terminal, and noticed a U-Haul van parked in the parking lot. T. 10. Upon arrival at the terminal, the officers were advised that one of the trailers had been broken into and cartons of merchandise had been removed and stacked on the ground behind the trailer. T. 14. When the opened trailer and unloaded merchandise were observed by two Consolidated employees, they immediately ran to the spot and four men ran away. One, the defendant Durkin, was physically

1. We have used the notation "R" to refer to the original documents filed in the District Court as compiled by the Clerk of that Court. We have used the notation "T" in referring to the court reporter's transcript of proceedings.

restrained by the two employees and taken into the terminal office. The other three escaped. T. 13. Koebele testified that the only description he had of the three men at the time was "very vague". T. 16. One of the individuals was a negro and two were white.[2] At that time the two Kane County deputies determined that the theft took place not in Kane County but in adjoining Kendall County. The county line, apparently, divides the terminal property. Accordingly, the Kendall County Sheriff's Office was called to the scene arriving about 12:20 A. M. At that time Koebele, with Kendall County Deputy, Charles Davis, returned to the Parkside Bowling Alley and noticed that the U-Haul van was no longer there. They returned to the terminal. T. 93.

Shortly thereafter, at the request of the Kendall County Sheriff's Office, Koebele and Lorang left the terminal in their squad car to determine whether they could apprehend the individuals responsible for the attempted theft. They went south from the terminal into Kendall County and, approaching the junction of routes 30 and 34, they noticed the tail lights of a vehicle proceeding somewhat slowly east on Route 34. T. 20, 105. Upon closer inspection, the vehicle appeared to be a U-Haul van and at approximately 1:00 A. M. the officers stopped the van. T. 22, 106. Interestingly, Deputy Lorang testified that at the time of the stop the officers were not at all sure that the van was the same van they observed earlier at the Parkside Bowling Alley. He was asked:

> "Q. Just personal opinion and suspicion, is that right?
> A. Yes." T. 109-110.

---

2. The record gives rise to some lingering doubts concerning the source of Deputy Koebele's information inasmuch as neither eye witness, Jenkins or Bringle, who were the only witnesses who saw three men running from the scene, testified that they relayed any descriptions at all, including height, weight, race, color, etc., to any of the officers prior to the arrest. To the contrary, both testified that they went to work, Bringle after a short excursion in a car with other employees. The defense contention at the trial that even the "vague" descriptions was an afterthought was supported by the failure of the evidence, of the officers as well as the eye witnesses, to attribute that information to any source at all.

Deputy Koebele testified that prior to stopping the van he advised his headquarters by police radio that he saw the van and was about to make a "traffic stop." T. 22. Both deputies testified that at the time of the stop neither the van nor its occupants were violating any law T. 59, 112. They also testified specifically that there was no violation of any traffic ordinance, that there were no weapons in evidence, that there were no unusual movements which caused them any specific concern for their own safety. T. 64 et seq. Koebele's testimony concerning the reason the van was stopped bears repeating:

> "Q. Now you stated you were looking for this van because of some suspicion that it was involved in this crime, is that correct?
> A. Yes, sir, that's correct, sir." T. 81-82.

The occupants of the van, of course, were Petitioners Byron, Prucha and McGhee and upon inquiry they identified themselves and advised Koebele that they were from the Chicago area. T. 23. He noted that two of the three were white and one was Negro and that the two occupants he could see clearly inside the van had mud splattered on the legs of their trousers such as might have resulted from running across the muddy field next to the terminal. T. 24. Accordingly, he told the driver to drive the van back to Consolidated Freightways while the police car followed. That was accomplished and Kane County deputies Koebele and Lorang turned their prisoners and the van over to the officers of the Sheriff of Kendall County.

Thomas N. Usry, Sheriff of Kendall County, testified that he arrived at the scene approximately 1:40 A. M. on May 27. T. 121. He noted at the time that four suspects were in custody and that the van was in the terminal yard. He learned the circumstances of the arrest and went to the van in order to take note of its serial number and determine whether or not it was stolen. When taking the number off the plate on the left door post, he saw wet and muddy gloves inside the van. T. 126. The sheriff then, in the company of another deputy, opened the van,

searched it, and retrieved the muddy gloves. T. 128. Those gloves were eventually admitted into evidence on the trial of the cause over defendants' objection. T. 576. The sheriff estimated the time of his seizure of the gloves in the van at approximately 2 A. M. T. 139.

Two Consolidated Freightways employees, Jack E. Jenkins, T. 170, and Harold E. Bringle, T. 241, also testified on the hearing on the motion to suppress. Jenkins' testimony indicated that he had come to work at the terminal shortly before 12 on the night in question, parked his car, and walked through the terminal gate. T. 171-172. At that time he saw three men run through the gate and go north on Route 30. The first man he described as a black man who appeared to be running away from the two white men who were following him. T. 174, 214. He did nothing additional at that time simply reporting for work as a mechanic in the Consolidated Freightways garage. Later that evening he was requested by Kendall County Deputy Davis to walk through the terminal office to see if he could identify anyone. T. 176. He walked through the terminal and told the deputy that one of the individuals then held therein, the defendant Byron, was the second man who ran through the gate. T. 181. He could not identify the first or third men, although the evidence is clear that both Prucha and McGhee were in the terminal office at the time Jenkins walked through. T. 206. The scene inside the terminal office at the time Jenkins made his tentative identification was best described by Deputy Davis as follows:

> "Q. Now, Officer, when you walked through the door, would you please describe in as much detail as you possibly can where each individual was sitting and the general description of where people were at that time when you walked through the door of the Terminal?
>
> A. As you walked through the door, on your right was Mr. McGhee, seated. About ten foot on his right was Mr. Byron, standing. Seated directly to his right was Mr. Prucha. To their right, which would be almost directly

> in front of us as we walked into the room, were two, maybe three dock employees. To their right would be the Terminal Manager and his assistant, and to their right would be Mr. Durkin in a glassed-in office but you could see him directly. To that right would be a woman, and she was either seated at the desk or walking around." T. 151.

Later, on June 3, 1971, Jenkins testified, he was interviewed by FBI agent Federle, who showed him a spread of photographs. T. 181. At that time he selected the photograph of the defendant Byron as the individual he had previously identified running through the gate on May 26.

The second Consolidated employee who testified was Harold E. Bringle. T. 241. He too had parked his automobile and was coming to work on the night in question when he saw three men running along the fence separating the terminal from the parking lot. T. 244. Unlike Jenkins, he identified all three of the defendants on trial as the individuals he saw at that time. T. 246-247. Upon seeing the men running away, he testified, he joined two other employees of Consolidated who did not testify, in an automobile and they drove north on Route 30 attempting to locate the three men. They did not see anyone although they went as far as the Parkside Bowling Alley where they truned around in the parking lot. They noticed a U-Haul van, a circumstance to which they apparently attached no significance, and they returned to the terminal to go to work. Later on the same morning at the request of his foreman, one Mike Egan, Bringle went to the terminal office and there identified all three defendants who were then in custody. T. 249. Months later, On November 18, 1971, Bringle stated, he was interviewed by FBI agent Federle. He too viewed the photographs and identified the photographs of the defendants among them. T. 252.

REASONS FOR GRANTING THE WRIT.

At the outset we suggest and the government conceded in the District Court, T. 333, that the arrest of Petitioners occurred when their liberty was restrained on Route 34 by Kane County deputies, *Henry* v. *United States*, 361 U. S. 98. We contend that that warrantless arrest cannot be justified by any information in the officers' possession which could be characterized as probable cause to believe that the occupants of the van had committed a crime.

At bottom, the rock upon which any attempt to spell probable cause from the facts of this case founders is the plain lack of any reasonable and rational connection between the van and the crime. Probable cause is, after all, a concept having a great deal to do with the common sense deductions reasonable men draw from the juxtaposition of known facts. From the facts (1) that somebody attempted to steal some merchandise from Consolidated Freightways and (2) that a U-Haul van was parked in a bowling alley parking lot three-fifths of a mile away, is it reasonable to draw the conclusion that the van was somehow involved in the theft? We think not. The policeman who testified that he did indeed draw such a conclusion could not, when asked, ascribe any reasonable basis for it. His conclusion, then, could be termed a suspicion, a hunch, or some insight peculiar to Kane County Deputy Sheriffs but not a reasonable basis for the drastic act of placing a citizen under arrest.

Our conclusion then is that the arrests of defendants by the officers does not pass muster applying the traditional tests of probable cause this Court has outlined over the years.[3]

It is, however, clear that the Court of Appeals did not rely on any of the traditional tests of probable cause in affirming these convictions. The reference in the memorandum order to *Terry*

3. E.g., *Beck* v. *Ohio*, 379 U. S. 89; *Aguilar* v. *Texas*, 378 U. S. 108; *Giordenello* v. *United States*, 357 U. S. 480; *Draper* v. *United States*, 358 U. S. 307; *Spinelli* v. *United States*, 393 U. S. 410.

v. *Ohio*, 392 U. S. 1, clarifies the logic upon which the Seventh Circuit's opinion is predicated. That is a theory that the investigative detention, permissible under *Terry*, subsequently ripened into probable cause for a full scale arrest in the traditional sense. We attack the application of the *Terry* decision to facts such as those involved in this case in the first instance. We contend that the kind of investigative detention this Court approved in *Terry* was simply not involved in this case. A *Terry* stop could not have ripened into probable cause to support a constitutional arrest because there was no permissible *Terry* stop to ripen.

Analysis of *Terry* v. *Ohio*, 392 U. S. 1, and its companion case, *Sibron* v. *New York*, 392 U. S. 40, reveals that those decisions are far from an open invitation to law enforcement officers to make illegal warrantless arrests without probable cause indiscriminately. In a most significant passage from the *Terry* opinion, this Court stated:

> "[I]n justifying the particular intrusion the police officers must be able to point to sufficient and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion . . ." 392 U. S. 1, 21.

The officers in this case had meager enough articulable facts they could point to for the purpose of justifying their stopping the van. Those facts are simply that three men were seen running away from the scene of a theft and that an apparently similar U-Haul van was observed parked in a bowling alley parking lot three-fifths of a mile from the same scene. Those facts provide no firmer foundation for the application of the *Terry* rule than they had for a finding of probable cause under the more traditional standard.

Even according the officers the full benefit of all of the rational inferences which may be derived from those meager facts, the predicate for the application of *Terry* is still insufficient. There is nothing at all in this record to support a rational inference that the parked van had anything at all to do with the

attempted theft. That was simply a policeman's guess. It is the constitutional purpose to place the liberty of a citizen outside the reach of a policeman's guess.

There are additional reasons militating to place this cause outside the ambit of the *Terry* rule. We quote again from the opinion in *Terry:*

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing *may be armed and presently dangerous,* where in the course of investigating this behavior *he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled* for the protection of himself and others in the area *to conduct a carefully limited search of the outer clothing* of such persons in an attempt *to discover weapons* which might be used to assault him." (Emphasis supplied)

There was nothing in this case to indicate any particular fear in the mind of either policeman when they determined to stop the van and seize the occupants. The evidence is bereft of any indication that any of the three appealing defendants were armed. There was no indication of any danger either to the officers themselves or to anyone else. When told by the arresting officers to drive their van to Consolidated Freightways, the defendants meekly and docilely did precisely that. Nothing in this entire record demonstrates any aggressiveness in their conduct at all. The plain fact of the matter is that this was an arrest and a search for evidence intended to link defendants to the commission of a crime. It was not a frisk for the limited purpose of stabilizing a potentially explosive situation and protecting the persons of the officers and others. To such a search for evidence *Terry* v. *Ohio* was never indicated to apply. *United States ex rel. Richardson* v. *Rundle,* 325 F. Supp. 1262 (E. D. Pa., 1971). We note in support of our contentions that when depu-

ties Koebele and Lorang in fact stopped the van, they did not even attempt the kind of frisk that *Terry* v. *Ohio* may permit in those circumstances. They did not pat down the outer clothing of the occupants of the van. Plainly, they anticipated no danger in the situation or they would not have risked the possibility that one of the occupants of the van would attack with a gun. These officers were not in fear and had no interest in weapons. Their interest solely was in obtaining evidence for subsequent use in a criminal case.

The circumstances in the instant case which are now relied upon to bring the case within the rule of *Terry* and to justify the interference under that rule had nothing in the world to do with stop and frisk. Accordingly, the reliance on *Terry* of both courts below was misplaced and we respectfully submit that *Terry* does not provide a viable basis upon which to affirm these convictions.

CONCLUSION.

Because the Court of Appeals significantly misapplied the doctrine this Court enunciated in *Terry* v. *Ohio*, 392 U. S. 1, to affirm these convictions, we respectfully petition this Court to issue is writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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May, 1973.

APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit, Chicago, Illinois 60604.

April 24, 1973.

Before

Hon. TOM C. CLARK, *Associate Justice.**
Hon. THOMAS E. FAIRCHILD, *Circuit Judge.*
Hon. WILBUR F. PELL, JR., *Circuit Judge.*

Argued April 4, 1973

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1573 *vs.*

ROBERT ALLEN BYRON, ROBERT FRANCIS PRUCHA and ULYSSES MCGHEE,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

71-CR-771

Alexander J. Napoli, Judge.

Appellants challenge their conviction of theft from an interstate shipment in violation of 18 U. S. C. 659. They attack the validity of their arrest, the subsequent search of their vehicle, and certain pre-trial corporeal and photographic identifications.

On May 26, 1971, at about midnight two Kane County Sheriff's patrolmen received a call that a theft was in progress at the Consolidated Freight Yards Terminal in Aurora, Illinois. As the patrolmen approached the Terminal, they passed the Parkside Bowling Alley, located a few blocks north of the Terminal. They observed a U-Haul van in the parking lot. It was a Ford model econoline van with small tires and a sagging front end.

* Associate Justice Tom C. Clark, United States Supreme Court, Retired, is sitting by designation.

The patrolmen knew that the bowling alley was closed at that hour and the parking lot was normally deserted. At the Terminal the officers learned that four men had been discovered stealing freight from a trailer. One had been captured, but three other, two white and one black, had escaped, running in the direction of the bowling alley.

About 12:30 a.m., during their routine patrol, the officers discovered that the van they had observed earlier was no longer in the parking lot. They returned to the Terminal to impart this information to the Kendall County authorities who had taken over the investigation there. At this point the Kane County officers were given a general description of the suspects. They continued on their patrol and about 1:00 a.m. they observed the tail lights of a Ford model U-Haul van moving slowly down a nearby highway. The van was going about 25-30 miles per hour in a 65 miles per hour speed zone. The officers decided to stop the van, which resembled the one they had seen earlier in the bowling alley parking lot.

The van's occupants fit the description of the theft suspects. The officers noticed mud on their trousers, which they recognized as resembling the mud found in the open field separating the Terminal from the Parkside Bowling Alley. Appellants explained they were from Chicago and were looking for fruit and vegetable stands. It was after 1:00 a.m. at this point. The officers requested that appellants accompany them back to the Terminal. The Government concedes that appellants were under arrest at this point.

At the Terminal appellants were allowed to mingle with Terminal employees in a room while two employees who had seen the thieves were brought in to identify appellants. One of these employees identified all three appellants, and the other positively identified appellant Byron. Photographs were also taken of appellants at this time which were exhibited to the identifying employees at a later date. The Kendall County Sheriff arrived and went to appellants' van to obtain its serial number. While taking this number from the plate on the left

door post, he saw wet, muddy gloves inside the van. The gloves were seized and used as evidence against appellants.

Appellants complain that the stop of their van by Kane County officers constituted an unreasonable search and therefore violated the Fourth Amendment. We hold the officers had ample justification for making the stop. See *Terry* v. *Ohio*, 392 U. S. 1 (1968). Once the officers were able to observe appellants and the mud on their clothes, their reasons for stopping appellants ripened into probable cause for arrest. *See Sibron* v. *New York*, 392 U. S. 40, 66 (1968). We hold further that the muddy gloves were legally seized. A movable vehicle may be searched for probable cause without a warrant. *See Chambers* v. *Maroney*, 399 U. S. 160 (1970). Moreover, the gloves were in plain view. *Cf. Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971).

Appellants argue that the pre-trial identifications by the two Terminal employees were impermissibly suggestive. We see nothing impermissibly suggestive in the mere fact that appellants were identified while present in a room containing, in addition to themselves, only Terminal employees and local law enforcement officials. *See Stovall* v. *Denno*, 388 U. S. 443 (1967); *Bates* v. *United States*, 405 F. 2d 1104 (D. C. Cir. 1968) (show-up at the scene of crime shortly after it was committed); *Neil* v. *Biggers*, 409 U. S. 188 (1972). Appellants concede that they had no right to have counsel present at the identifications held at the Terminal. *Kirby* v. *Illinois*, 406 U. S. 682 (1972). Nor were they entitled to have counsel present at subsequent photographic identifications. *See, e.g., United States* v. *Robinson*, 406 F. 2d 64 (7 Cir.) cert. denied 395 U. S. 926 (1969). *Contra, United States* v. *Ash*, 461 F. 2d 92 (D. C. Cir.), cert. granted, 32 L. Ed. 2d 682 (1972). Appellants also fail to establish that such photographic identifications were impermissibly suggestive. *See Simmons* v. *United States*, 390 U. S. 377 (1968); *United States* v. *Cantu*, ... F. 2d (7 Cir., Oct. 6, 1972).

The judgment is therefore affirmed.